



POLICE DEPARTMENT

October 1 , 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Shirley Aubin-Pino
Tax Registry No. 931497
Patrol Borough Brooklyn North
Disciplinary Case No. 84218/08

The above-named member of the Department appeared before me on April 1, 2010 and May 18, 2010, charged with the following:

1. Said Police Officer Shirley Aubinpino,¹ assigned to the 77th Precinct, on or about May 28, 2007, did fail and neglect to properly safeguard her service firearm, to wit, a Sig Sauer serial #U646768.

P.G. 204-08, Page 2, Paragraph 7 – FIREARMS – GENERAL REGULATION

The Department was represented by Rudolph Behrmann, Esq. and Nancy Slater, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through her counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

¹ While the Department spelled the Respondent's name as "Aubinpino," the Respondent testified that the correct spelling of her name is "Aubin-Pino."

DECISION

The Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer Thametha Mosley-Lawrence, Sergeant Christopher Twomey, and Sergeant William Gavin as witnesses.

Police Officer Thametha Mosley-Lawrence

Mosley-Lawrence, an eight-year member of the Department, is currently assigned to the 72 Precinct. She has known the Respondent since they came out of the Police Academy in 2002 or 2003. On May 28, 2007, she and the Respondent worked together as partners in the 77 Precinct. When she arrived at the command at approximately 1:00 p.m. that day, she went to the female locker room and retrieved her gun belt and vest from her locker. She then went into the Respondent's locker to retrieve her radio. Mosley-Lawrence explained that she had given the Respondent her radio because the Respondent's radio was broken. At the time, she had known the combination to the Respondent's locker for more than a year. Mosley-Lawrence found the radio on the Respondent's gun belt, which was hanging on a hook inside the top of the locker. Mosley-Lawrence did not notice the Respondent's firearm because she was just focused on getting the radio. At no point while the Respondent's locker was open did Mosley-Lawrence turn her back to the locker or allow anybody else access to it.

Mosley-Lawrence testified that the Respondent's locker was slightly defective. She explained, "When you close it, the bottom is not all the way secure." Although this

defect was not noticeable, Mosley-Lawrence was aware of it prior to that day, and she believes the Respondent was aware of it as well. She did not look that day to see if the locker had been tampered with.

Approximately five to ten minutes after Mosley-Lawrence retrieved the radio, the Respondent arrived at work. At some point after that, the Respondent informed Mosley-Lawrence that her gun was missing from her locker. Two jerseys were also missing from the locker. The Respondent and Mosley-Lawrence searched the command for the gun. When they failed to find the firearm, they reported the loss to the desk officer, Sergeant Twomey. To Mosley-Lawrence's knowledge, the gun has never been recovered, and she has no idea who took the gun from the Respondent's locker.

On cross-examination, Mosley-Lawrence testified that on May 27, 2007, she and the Respondent bought baseball jerseys with the precinct logo on them. The Respondent had bought two jerseys, and Mosley-Lawrence placed the jerseys in the Respondent's locker because she (Mosley-Lawrence) was doing administrative work inside the station house and the Respondent was working outside that day. The Respondent and Mosley-Lawrence knew the combinations to each others' lockers, and they never heard or read anywhere that it was improper to tell someone your combination. The Respondent first gave Mosley-Lawrence her locker combination when she (the Respondent) was in an on-duty accident and did not want to leave her vest, gun belt, and shield in the hospital. The Respondent gave Mosley-Lawrence the combination so that Mosley-Lawrence could safeguard the property in her locker.

Mosley-Lawrence reiterated that the Respondent's locker was slightly defective. The bottom left corner of the locker door was pulled back from the frame approximately

an inch. Mosley-Lawrence, nevertheless, believed that the locker was properly secured. She never thought that somebody would access the locker through that gap. With a closed gun belt hanging from a locker hook, the gun would be near the top of the locker for an officer who is right-handed and near the bottom of the locker for an officer who is left-handed. With an unclosed gun belt, the gun would be about halfway down the locker. Personal items, such as sneakers, work gear, and flashlights had been stolen from the female locker room before.

On redirect examination, Mosley-Lawrence testified that the personal items that had been stolen from the locker room were taken from the tops of lockers, not from inside lockers. Upon questioning by the Court, she stated that she did not know of any other lockers being bent in the way that the Respondent's locker was.

Sergeant Christopher Twomey

Twomey, a 17-year member of the Department, is currently assigned to Patrol Borough Brooklyn North. While he was assigned as 77 Precinct desk officer on May 28, 2007, the Respondent notified him that her firearm was missing from her locker. Twomey then went to the locker room to visually inspect the Respondent's locker. He saw that there was a small gap in the lower portion of the locker. This was the only damage to the locker, and he did not notice any damage to the lock. To his knowledge, the Respondent had never submitted a request for a locker repair or replacement. Twomey instructed that no one should touch the locker because he thought it should be dusted for fingerprints. If the Respondent had not wanted to keep her firearm in her locker, she could have vouchered the gun and stored it in the precinct property room.

There was also a gun locker in the station house, but it was intended for short-term storage only.

On cross-examination, Twomey testified that a supervisor is supposed to inspect station house locker rooms at least once each tour. If a supervisor sees an unsecure locker, he should bring it to someone's attention. Twomey, who had conducted inspections of the female locker room before, never noticed the gap at the bottom of the Respondent's locker prior to that day. Twomey did not think he could get his hand in the gap, but somebody with a small arm might have been able to. It is possible that the gap used to be smaller and was recently pried larger. Had he noticed the gap before, he probably would have done something about it. He thought that the locker should be dusted for fingerprints because he believed that the gun might have been stolen from the locker through the gap. To his knowledge, there is nothing wrong with one officer telling another officer her locker combination.

On redirect examination, Twomey testified that the Respondent had never notified him of a locker defect prior to that day. If the place where an officer stores her firearm becomes unsecured, the officer has a duty to try and secure the firearm someplace else.

Upon questioning by the Court, Twomey testified that he did not know of any other lockers being damaged in the way that the Respondent's locker was.

Sergeant William Gavin

Gavin, an 18-year member of the Department currently assigned to the Internal Affairs Bureau, investigated the circumstances surrounding the Respondent's missing firearm. He inspected the locker to determine if anybody had broken into it. He found

that the lock was in normal condition, but “the lower part of the locker, the hatch, was a little messed up, like a little banged up.” The investigation ultimately concluded with a determination that the locker had not been tampered with. Prior to the incident, the Respondent never reported that her locker was damaged.

On cross-examination, Gavin testified that the Respondent was charged with failing to safeguard her firearm due to the fact that her firearm was lost or stolen. According to Gavin, whenever an officer becomes separated from her firearm, that officer has failed to safeguard it. There is nothing wrong with an officer storing her gun in her locker. Nobody was ever charged with stealing the Respondent’s gun.

On redirect examination, Gavin testified that analysis from the Crime Scene Unit did not show that the Respondent’s locker was broken into or tampered with. According to Gavin, it would have been highly impossible for a person to remove the Respondent’s gun through the broken hatch portion of the locker.

Upon questioning by the Court, Gavin stated that to his knowledge this was the first time that a firearm was taken from a locker in the 77 Precinct station house. On recross-examination, though, he conceded that he never checked old logs or interviewed anybody to confirm that a gun had never been reported stolen from the precinct before.

The Respondent’s Case

The Respondent testified in her own behalf.

Respondent Police Officer Shirley Aubin-Pino

The Respondent, an eight-year member of the Department, is currently assigned

to the Brooklyn North Evidence Collection Team. She previously worked in the 77 Precinct for six-and-a-half years. For the 4:00 p.m. by 12:00 a.m. tour on May 27, 2007, she was assigned to work an outside post while her regular partner, Mosley-Lawrence, had an administrative post inside the station house. Because her radio had been sent out for repair, the Respondent borrowed Mosley Lawrence's radio for the day. At one point during her tour, Mosley-Lawrence informed the Respondent by telephone that precinct jerseys she had previously ordered were being distributed at the station house. Mosley-Lawrence placed two jerseys inside the Respondent's locker. The Respondent explained that Mosley-Lawrence knew her locker combination because five years earlier she had been in a car accident and was taken to the hospital. Mosley-Lawrence was given the combination at that time so that she could secure the Respondent's gun and vest back in her locker. At 1:35 a.m. on May 28, 2008, the Respondent was relieved at her post, returned to the station house, and put her gun belt with her gun and Mosley-Lawrence's radio on it inside her locker. She also left one of the jerseys inside the locker for the night.

When the Respondent returned for her next scheduled tour at 2:00 p.m. that day, she went to her locker and realized that her firearm was not there. She looked around for the gun but did not find it. The baseball jersey and a hat were also missing from the locker, and the Respondent knew that the locker had been broken into. The lock had not been compromised in any way, but there was a crease or small dent in the lower left hand corner of the locker. Although the dent was not there before that day, the locker had been warped for some time. She explained that warped lockers were common, and the door of the locker had to be kicked in order to close properly. The Respondent never felt before

that the locker was not secure. The lockers in the station house were regularly inspected, and nobody ever informed the Respondent that there was a problem with her locker. Had the Respondent believed there was a problem, she would have asked for a new locker. The Respondent had no reason to believe that her gun would not be safe in her locker that night. She had the same locker since she started at the command in 2003. The Respondent notified Twomey and her union delegate about the missing firearm. The Evidence Collection Team later came to dust the locker for fingerprints.

On cross-examination, the Respondent testified that she hung her gun belt on a hook located on the left side in the front of the locker, and her holster was down at the locker floor. She had hung the baseball jersey from a hanger on the locker closet rod. When her union delegate came to the locker, he was able to reach his hand into the locker through the spot where the door was creased. The delegate told the Respondent that he was able to reach the bottom of the her gun belt and also pull the shirts hanging on the closet rod, but she did not recall him actually demonstrating these acts. The Respondent reiterated that her locker door was warped, meaning it did not sit in the frame properly and stuck out at the bottom. To her recollection, the locker did not look like it had been rummaged through.

On recross-examination, the Respondent testified that the creased portion of the locker door had been flat and smooth until that day. The crease looked like the door had been bent open and then pressed closed again. The crease was located on the same side of the locker as her gun belt. The gun belt hung down on the same side that the door opens. [Department's Exhibits 1 through 5 are photocopies of photographs of the Respondent's locker, taken on May 28, 2007.]

FINDINGS AND ANALYSIS

The Respondent stands charged with failing to safeguard her service firearm, to wit: a Sig Sauer serial #U646768. The Respondent is found Guilty. Evidence adduced at trial established that the Respondent had placed her gun in the holster on her gun belt and hung her gun belt with the gun hanging downward in her personal locker at her command at the 77 Precinct station house. She testified that the day before, on May 27, 2007, she had worked a 4 p.m. to 12 a.m. tour of duty and left the gun belt in her locker with the firearm holstered. When she reported for duty the following day on May 28, 2007, she went to her locker and when she opened her locker and lifted her gun belt up, the firearm was not there.

She realized that her firearm and a jersey that was in her locker were both missing. The Respondent checked the gun locker by the desk officer, but her gun was not there. She notified Sergeant Twomey who was on duty and he in turn called the Internal Affairs Bureau. A search of the locker room and surrounding areas were performed by the Respondent, her partner and Twomey to no avail. The Respondent said the Evidence Collection Unit came and dusted for prints.

The Respondent noticed a dent as well as a "crease" in the left side of her locker. The Respondent explained that she had the locker since January 27, 2003 when she was first assigned to the 77 Precinct. She further explained that the locker had a dent at that time and because of the dent in the frame, she had to kick the locker to hold it in its frame to close it. The Respondent also testified that on the incident date, a union delegate was able to put his hand into her locker from the bottom and feel her gun belt. He was also

able to pull at, from the bottom of the locker, shirts that were hanging on hangers on a rod inside the upper part of her locker. The Respondent testified that she did not recall him actually demonstrating these acts by pulling the items out of the locker.

The Respondent noted that the side where her locker was bent looked like it had a crease. She explained that the crease looked as if it had been opened and closed back. She further explained that her gun belt hung down on the same side where the crease was. She stated that prior to the incident date, May 28, 2007, the locker did not have the crease.

The problem with the Respondent's account is that her locker had a defect. She testified that it had a dent which required her to kick it to get it to line up. The Respondent never reported this problem to Twomey or to any other supervisor. In addition, her partner, Mosley-Lawrence testified at this proceeding. She has known the Respondent since their days in the Police Academy in 2002. Mosley-Lawrence testified that she knew of a defect in the bottom of the Respondent's locker prior to May 28, 2007. She noted that she had not noticed any other locker in the command in that condition. She also noted that things had been taken before from the 77 Precinct station house.

The Respondent had a duty to report the defect in her locker, particularly since she stored her firearm in there. The constant kicking of the locker may have compromised its condition. Desk Sergeant Twomey testified that to his knowledge the Respondent never made a request to have any repair done on her locker. Although the Assistant Department Advocate argued that a crime scene analysis was done of the Respondent's locker and there was no evidence of tampering or a break in, no report was offered in evidence to support that conclusion; nor was anyone from that unit called in to

testify at this proceeding. In addition, the Court is hard-pressed to believe that analysis given the statement of the Respondent that a union delegate was able to reach from the bottom of her locker and touch her gun belt and potentially pull shirts out of her locker if it did not have some type of defect. Furthermore, the photocopies of the five photographs taken by the Crime Scene Unit of the Respondent's locker were black and white copies. They were not the original photographs; they were not clear copies and did not depict the actual condition of the locker. Thus, they were not useful as an aid to this Court to make a factual determination.

Because the Respondent had a known dent in her locker, had to kick it to get it to line up, and she failed to report the condition of her locker to a supervisor at work, she is found Guilty as charged.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined, see *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on July 1, 2002. Information from her personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

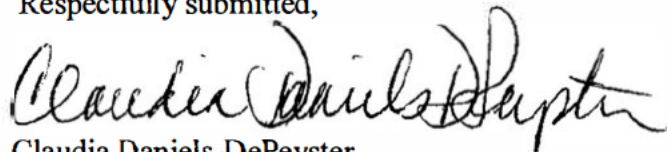
The Respondent has been found Guilty of failing and neglecting to properly safeguard her firearm. To determine an appropriate penalty, the Court looked to prior cases on this issue. In Disciplinary Case No. 85521/09 signed January 12, 2010, an eight-year police officer with no prior disciplinary record negotiated a penalty of 20 vacation days for failure to safeguard his firearm. In that case, the Respondent's off-duty

firearm was stored in his Department locker and when he went to retrieve it for the annual gun inspection, he stated it was missing. There were no signs of vandalism or damage to the lock or locker. In Disciplinary Case No. 85517/09 signed January 26, 2010, a 19-year police officer with no prior disciplinary record negotiated a penalty of 20 vacation days for failure to safeguard his off-duty firearm. In that case, the Respondent could not locate his off-duty firearm for the annual inspection. The weapon was stored in his locker and there was no evidence of the lock being damaged or vandalized.

In this instance, there was testimony that the Respondent's locker had been compromised in some fashion. It had a dent and the Respondent had to kick it to get it to line up. Her partner also testified that it had a defect in the bottom. Whether the locker had been bent open and closed back was speculated to by the Respondent and the manner in which her gun was taken calls for speculation, but the condition of the locker coupled with the Respondent's failure to report it to superiors did seem to bear upon the ability of someone to take the contents from inside of it.

Accordingly, I recommend that the Respondent forfeit 20 vacation days.²

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials



APPROVED
JAN 19 2011
RAYMOND W. KELLY
POLICE COMMISSIONER

² Although there was testimony that the Respondent's partner Mosley-Lawrence had her locker combination because of an accident years earlier where she had to place the Respondent's equipment in her locker, this Court did not consider that evidence at this trial. Both the Respondent and Mosley-Lawrence had each other's combination lock number. Mosley-Lawrence denied taking her partner's gun and was never accused or charged with said misconduct.

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner -- Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER SHIRLEY AUBIN-PINO
TAX REGISTRY NO. 931497
DISCIPLINARY CASE NO. 84218/08

In 2009 and 2007, the Respondent received an overall rating of 4.0 "Highly Competent" in her annual performance evaluations. In 2008, she received an overall rating of 3.5 "Above Competent." The Respondent received three Excellent Police Duty Medals in her career.


[REDACTED]

[REDACTED]

[REDACTED]

On March 14, 2005, the Respondent received a Charge and Specification for stopping and questioning an individual without the requisite legal authority. The Charge and Specification was dismissed on Department's motion February 21, 2006.

For your consideration.


Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials